Supreme Court, U.S.
FILED
SEP 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-416 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH SCAGLIONE,

Petitioner

v.

COMMUNICATIONS WORKERS OF AMERICA LOCAL 1395 and AT&T TECHNOLOGIES, INC.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT AT&T TECHNOLOGIES, INC.

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QUESTIONS PRESENTED

1. Should Del Costello, decided by this Court in 1983, establishing a six-month statute of limitations for actions by individuals against their unions and companies, be applied retroactively to bar a suit brought in 1977, when the appropriate statute of limitations was six years against companies and three years against unions?

2. Should the statute of limitations begin to run when the union has not informed its member that it has concluded its processing of the grievance?

3. Does a union owe a fiduciary obligation to its members which requires it to notify its members in writing that it has concluded the processing of a grievance, and of a right to bring suit for breach of the duty of fair representation?

4. Whether the statute of limitations in a suit by an individual against the union should begin to run where the union is still pursuing the grievance.

5. When should the statute of limitations begin to run against a union for breach of the duty of fair representation?

PARTIES

Petitioner and respondents are identified in the petition.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet., App. A) is not reported. The opinion of the Court of Appeals denying rehearing is not reported. The Memorandum of Decision of the District Court granting the motion of respondent AT&T Technologies, Inc. for summary judgment is not reported. The Memorandum of Decision of the District Court granting the motion of respondent Local 1395 of the Communications Workers of America for summary judgment (Pet., App. B) is not reported. An earlier opinion of the Court of Appeals (Pet., App. C) is not reported. An earlier Memorandum of Decision of the District Court (Pet., App. D) is not reported.

JURISDICTION

The Court of Appeals issued its opinion affirming the decision of the United District Court on April 17, 1985. A timely petition for re-hearing was denied on June 10, 1985.

This court has jurisdiction pursuant to 28 U.S.C., section 1254(1).

STATUTES AND RULE INVOLVED

This case involves the interpretation and application of 29 U.S.C., section 185 and 29 U.S.C., section 160(b). The texts of those statutes are set forth respectively in Appendices E and F of the Petition.

Rule 52(a), Fed. R. Civ. P., provides in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

Petitioner, Joseph Scaglione, was discharged from his employment as a telephone selector with Western Electric Company, now known as AT&T Technologies, Inc. (the "Company") in October, 1975 for continuing unsatisfactory job application, performance, attitude and insubordination, including walking off his job on the night preceding his discharge. Following his discharge, petitioner sought to prosecute a grievance with respect to it in accordance with the procedures set forth in the collective bargaining agreement (the "Agreement") then in existence between the Company and the Communications Workers of America (the "CWA"). Under the Agreement, the entity having responsibility for the initial prosecution of the grievance was Local 1395 of the CWA ("Local 1395" or the "Union"), which was the Local having responsibility for the Company's warehouse in Southborough, Massachusetts, where petitioner was employed.

Petitioner met with representatives of the Union with respect to his grievance in December, 1975 and again in January, 1976. Thereafter, petitioner had no further contact with the Union until May, 1977 when, in response to an inquiry about the status of his grievance, petitioner was allegedly told by the person who was then president of the Union, Francis J. Burns, that he — Burns — would work on petitioner's case in "seven to ten years."

In December, 1977, petitioner commenced this action in the Superior Court of Massachusetts alleging that the Union and Burns had improperly failed to prosecute the grievance with respect to his discharge. In April 1979, petitioner moved to amend his complaint by naming the Company as an additional party defendant and adding new allegations that his discharge violated the Agreement and that the Company had libeled or slandered petitioner in connection with his discharge. The Superior Court allowed this motion to amend on April 9, 1979.

The Company removed the case to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1446. On June 11, 1979, the Company filed an answer to the amended complaint in which, among other things, it denied the substance of petitioner's allegations, and raised the affirmative defense that the amended complaint was barred by the applicable statute of limitations.

From June 1979 through January 1981, petitioner served a set of document requests on defendants and took two depositions, each lasting approximately one-half day. Thereafter, on January 16, 1981, the District Court held a pretrial conference at which petitioner agreed to dismiss his complaint against Burns. On February 4, 1981, the Company moved for summary judgment on the grounds that petitioner's own deposition showed that he had been properly discharged and that he had alleged no facts showing that the Union had breached its duty of fair representation in connection with the discharge. On February 25, 1981, the Union

also moved for summary judgment and, in support thereof, filed an affidavit of Burns.

On August 7, 1981, the District Court granted defendants' motions for summary judgment and, in connection therewith, issued an opinion concluding that petitioner had failed to raise a genuine issue of material fact with respect to whether the Union had breached its duty of fair representation in processing his discharge grievance. Pet., App. D. On appeal, the District Court's judgment was reversed and remanded in an opinion issued by the Court of Appeals on June 22, 1982. The Court found that petitioner had raised a genuine issue of material fact with respect to the Union's processing of his grievance. Pet., App. C.

On remand, petitioner unsuccessfully moved to transfer the case to another judge on the ground that the judge who had previously granted defendants' motions for summary judgment was prejudiced against him. Thereafter, on April 29, 1983, the District Court issued an opinion denying petitioner's motion to add a claim for breach of the implied duty of fair dealing.

In August, 1983, the defendants moved for summary judgment on the grounds that the United States Supreme Court's decision in *Del Costello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983) established that petitioner's amended complaint was barred by the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

After holding a hearing, the District Court on November 15, 1983, denied the Union's motion for summary judgment, but granted the Company's motion. In an accompanying opinion, the Court held that since petitioner's cause of action against the Company accrued on or before December 29, 1977, it was barred by the applicable six month statute of limitations. The Court also held that petitioner had asserted no facts that would toll the statute and that his amended complaint against the Company did not relate

back to the date petitioner filed his original complaint against the Union defendants in December, 1977 (*Id.*). In the same opinion, the District Court found that there was a material dispute as to when petitioner became aware or should have become aware that Local 1395 would not pursue his grievance.

On October 9, 1984, a trial was commenced, limited to the threshold issue of when petitioner's cause of action accrued against the Union. After hearing testimony and evidence from the petitioner, the District Court on October 10, 1984 ruled that petitioner's action had accrued against the Union prior to June, 1977, and hence was barred by the six month statute of limitations. The District Court accordingly entered judgment for the defendants. Pet., App. B. The Court of Appeals affirmed the District Court's opinion on April 25, 1985, and denied rehearing on June 10, 1985. Pet., App. A.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals affirming the judgment of the District Court is consistent with the decisions of this Court and other courts of appeal. The petition does not present any issue warranting review by this Court.

1. The first question suggested by the petition — whether this Court's holding in *Del Costello* v. *International Brotherhood of Teamsters* should be applied retroactively to so-called hybrid actions brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, prior to April, 1981, when the Court announced its opinion in *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981) — has been answered by the Court in *Del Costello* itself and in its companion case, *United Steel Workers* v. *Flowers*. In both *Del Costello* and in *Flowers* the Court applied the six month limitations period to actions which had been brought in 1978 and in 1979 respectively. 462 U.S. at 155-158. The circumstances of the *Del Costello* and *Flowers* cases are the same

in all pertinent respects as the present case, and there is no basis for reaching a different result here. See also *Mitchell*, 451 U.S. at 64 (approving district court's retroactive application of 90-day limitation period imposed by New York arbitration statute to suit under §301 commenced in July, 1978).

Petitioner nevertheless asserts that the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), compel a holding of nonretroactivity here. This is not correct. The factors outlined in *Chevron* are not satisfied in this case:

(a) *Del Costello* did not overrule "clear past precedent" in the First Circuit, as petitioner asserts. Pet. 8. While there was dicta in *De Arroyo* v. *Sindicato De Trabajadores Packing, AFL-CIO*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970), indicating that the state contract limitations period was applicable to an employee's suit against his employer for breach of a collective bargaining agreement, the question was not decided in *De Arroyo* which held only that the one year Puerto Rico tort statute of limitations applied to an employee's § 301 suit against his *union*.

(b) Nor does a consideration of the purpose and effect of the rule in question support a finding of nonretroactivity, as petitioner asserts at pages 9-10 of his petition. In fact, as numerous courts of appeal have repeatedly recognized, the purposes of the *Del Costello* rule were to achieve uniformity of treatment among similar cases and promote the finality of grievance-arbitration decisions. These purposes clearly would not be served, but in fact would be substantially eroded, by a failure to apply *Del Costello* retroactively. *E.g.*, *Local 1397* v. *United Steelworkers*, 748 F.2d 180, 184-85 (3rd Cir. 1984) ("the importance of uniformity of limitations periods" in labor law "was a major consideration in the *Del Costello* opinion itself" and favors retroactivity); *Landahl* v. *PPG Industries*, 746 F.2d 1312, 1315 (7th Cir. 1984) ("giving retroactive effect to the *Del Costello* rule would further its purpose"); *Lincoln* v. *District 9, International Association of Ma-*

chinists, 723 F.2d 627, 630 (8th Cir. 1983) ("retroactive application of *Del Costello* would further the policy of prompt settlement of labor disputes").

(c) Finally, contrary to petitioner's assertions (Pet. 10), application of the *Del Costello* rule in this case would not result in any substantial inequity to petitioner. Petitioner delayed bringing any action against the Union until December, 1977, which was more than two years after his discharge. He did not name the Company as a defendant or otherwise notify it of the lawsuit until April, 1979. The Company promptly asserted in its answer that the claim against it was barred by the applicable statute of limitations. Thereafter, by the time the Court's decision in *Mitchell* was announced in April, 1981 — which petitioner himself concedes clearly foreshadowed the *Del Costello* holding — petitioner had engaged in only limited discovery and had not requested or obtained any trial of the merits of his claim.

In light of these circumstances, this case is not like those cited in the petition, where courts of appeal refused to apply *Del Costello* retroactively on the grounds that the plaintiff, prior to the time *Del Costello* was announced, had "expended considerable time and effort in the development of [his] case on the merits." *Zemomick* v. *Consolidation Coal Co.*, 762 F.2d 381, 387-88 (4th Cir. 1985). See also *Byrne* v. *Buffalo Creek Co.*, 765 F.2d 364 (2d Cir. 1985) (refusing to apply *Del Costello* retroactively where parties had already invested a "large amount of time and money" in the lawsuit and a full trial on the merits had been held).

Nor is this case like *Edwards* v. *Teamsters Local No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984), also cited in the petition, which was subsequently followed in *Barina* v. *Gulf Trading & Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). In *Edwards*, the Ninth Circuit held, without extended discussion, that *Del Costello* should not be retroactively applied in the case before it because the decision had overruled clear past

precedent that had previously existed in the Ninth Circuit. Similar reasoning cannot be followed in the present case because, as stated above, there was no clear precedent in the First Circuit as to what statute of limitations would be applied to an employee's suit against his or her *employer* under Section 301. Pps. 5-6 *supra*. Accordingly, even assuming it was correctly decided, the decision of the Ninth Circuit in *Edwards* does not offer any substantial support for petitioner's position in this case.[1]

For the foregoing reasons, the Court of Appeals was correct in holding, consistent with the decisions of numerous other courts of appeal, that the six month limitations period set forth in Section 10(b) of the NLRA is applicable in this action. *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 512 (1984); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, 105 S. Ct. 292 (1984); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*); *Storck* v. *Teamsters*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9, International Association of Machinists*, 723 F.2d 627 (8th Cir. 1983); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358 (10th Cir.), *cert. denied*, 105 S. Ct. 594 (1984); *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 292 (1984).

2. Although the petition purports to raise four other questions in addition to the retroactivity issue, petitioner does not discuss any of these additional questions or say why certiorari should be granted with respect to them. In fact, each of the additional questions have to do with when petitioner's cause of action originally accrued, which is a factual guestion governed by the "clearly

[1] Petitioner also cites the decision of the Sixth Circuit in *Pitts* v. *Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir. 1983), but *Pitts* does not support petitioner's position in this case because the Sixth Circuit subsequently held *en banc* that *Del Costello* must be applied retroactively. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (*en banc*).

erroneous'' rule set forth in Rule 52(a), Fed. R. Civ. P. Petitioner does not appear to suggest that this happened at any time after December, 1977, when he in fact brought suit against the Union. Since petitioner did not add the Company as a defendant in the action until April, 1979 — or more than 15 months after he brought suit against the Union — the Court of Appeals properly held that petitioner's claim against the Company was barred by the six month statute of limitations.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 23, 1985